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The Use in Montana of the Trust as a Substitute for a Will

CHARLES W. LEAPHART*

Prior to 1536 in England the use was a favorite means for devising land in evasion of the law forbidding its devise. The passage of the Statute of Uses in 1536¹ curtailed the scheme.² The hostility thereby engendered resulted in the passage in 1540 of the Statute of Wills³ restoring the power to devise lands.⁴ While that statute and other succeeding legislation render the use and its modern successor, the trust, no longer indispensable to the owner of property who wishes to will his real property yet the trust is a device which is now and has for some time been very much in use as a substitute for a will both for devising land and bequeathing personal property.

As a substitute for a will it has been perhaps most frequently used to escape inheritance and succession taxes. While the avenues of successful evasion of those burdens may have been almost if not quite completely closed, there still remain advantages to be gained by its use, chief of which is avoiding the expense and delay which is attendant upon probate proceedings. If the trust is successfully created the beneficiary who is to come into possession of the property upon the death of the creator of the trust may begin that enjoyment immediately thereafter. The expenses are largely in the control of the settlor,⁵ and may be especially small when the trustor is also trustee.

In most jurisdictions the trust can be made an almost if not a perfect substitute for a will.⁶ The trustor may enjoy the property during his life substantially as though he had the entire ownership, and where "tentative trusts" are held valid, may even retain complete control of the species of property to which the doctrine applies.⁷ In Montana the extent to which it can be used is not clearly indicated by statute or decision. It is

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¹ 27 HENRY VIII, c. 10 (1536).

² 4 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1924) p. 464.

³ 32 HENRY VIII, c. 1 (1540).

⁴ HOLDSWORTH, *op. cit. supra* note 2, p. 465.

⁵ For figures see STEPHENSON, LIVING TRUSTS (1928) p. 273 *et. seq.*

⁶ See Leaphart, *The Trust as a Substitute for a Will*, 78 U. OF PA. L. REV. 626 (1930). Acknowledgement is due to the UNIVERSITY OF PENNSYLVANIA LAW REVIEW for its kind permission to use material from that article.

⁷ See the tentative trust cases discussed *infra*, pp. 33, 34.

the purpose of this article to discuss the use of this device in Montana.

The creation of a trust is simple as far as formalities go. If the settlor, or creator of the trust, or as defined in our codes, the trustor,⁸ desires to make himself trustee of his personal property, he may in Montana,⁹ as elsewhere, use any form of words to make his intent known. In the case of real property in Montana he must comply with the Montana Statute of Frauds.¹⁰

If the settlor desires to have another than himself as trustee he must take proper steps to transfer the property. If it is a trust of personal property presumably in Montana, as in the case of a gift not on trust,¹¹ there must be delivery of the property if capable of delivery, or delivery of a deed or written grant;¹² if of real property, there must be a delivery of a deed to the property.¹³ In other jurisdictions the cases are numerous in which intended gifts in trust have failed because the transfer of title was incomplete.¹⁴ While one might expect that all the requisites would be necessary that are demanded when an outright gift is made, yet the doctrine that equity will not let a trust fail for want of a trustee has been held applicable in cases of deeds of land upon trust where the trustee was either not named in the deed or was not a legal entity.¹⁵ The Montana Supreme Court has not passed upon this question. It is perhaps doubtful enough so that ordinary caution would require the naming of a trustee in the deed. Although Sections 7884 and 7885, R. C. M. 1935, in stating how a trust is created, do not lay down in their requirements, the necessity of delivery of deed or property to a trustee, it is not at all likely that delivery of deed or property will be dispensed with when the trustor seeks to make another than himself trustee of the trust.

⁸ R. C. M. 1935, §7881. The term *trustor* though not in general use will be frequently used in this article to designate the settlor or creator of the trust.

⁹ R. C. M. 1935, §7884 and cases in annotations thereto.

¹⁰ R. C. M. 1935, §6784 and cases in annotations thereto.

¹¹ R. C. M. 1935, §6883; O'Neil v. O'Neil (1911) 43 Mont. 505, 117 P. 889; Fender v. Foust (1928) 82 Mont. 73, 265 P. 15. A portion of the gift, the trial court found, was given to be divided between three others. The Court did not discuss whether this created a trust.

¹² R. C. M. 1935, §§6843-6848 and annotations thereto.

¹³ Springhorn v. Springer (1926) 75 Mont. 294, 243 P. 803; Hayes v. Moffatt (1928) 83 Mont. 214, 271 P. 433; Carnahan v. Gupton (1939) 109 Mont. 244, 96 P. (2d) 513.

¹⁴ For a collection of cases see 1 SCOTT ON TRUSTS (1939) §32.2, note 1.

¹⁵ Dominy v. Stanley (1926) 162 Ga. 211, 133 S. E. 245; Wittmeier v. Heiligenstein (1923) 308 Ill. 434, 139 N. E. 871; Bailey v. Kilburn (1845) 10 Metc. (Mass.) 176. But see Rixford v. Zeigler (1907) 150 Cal. 435, 88 P. 1092.

If the trustor is making himself trustee he will naturally make no delivery or other transfer of the property. The trust will be complete on his declaration. It is unnecessary for the trustor to part with the trust instrument." The trustor must create interests in the beneficiary while he is alive. Otherwise the creation will be testamentary and to be valid must comply with the Statute of Wills." If the trustor is making another, trustee, he must not retain control of the legal title. He may however, deliver the deed to a third party to deliver it on his death to a trustee upon trust." While no Montana case has been found dealing with the question in which a trust was involved, there should be no doubt of the result in view of the court's decision that a deed delivered to a third party to be turned over to the grantee upon payment by him of funeral expenses of the grantor was a valid *inter vivos* conveyance." Postponement of enjoyment is not fatal."

Assuming that he complies with the foregoing requisites for creating an *inter vivos* trust, may a trustor create a trust in Montana of real or personal property for the benefit of himself for life, remainder over to another, which will be valid though the conveyance does not satisfy the statutory provisions regarding wills? It is well settled in other jurisdictions that he may.²¹ The Supreme Court of Montana has made no pronouncements. It has, however, decided that an owner of real property may, reserving a legal life estate in himself,²² deed the remainder over to another. Putting the life estate in trust followed by a legal remainder should not make the conveyance testamentary. Section 6787, R. C. M. 1935, restricts the purposes for which a trust of real property may be created but expressly permits trusts to pay the rents and profits for the life of a beneficiary, and neither expressly nor by implication excludes an equitable interest in the grantor. And in New York from which state the statutory provision was taken, the settlor apparently may create such an interest in himself, remainder over to another.²³

There is no express provision in the codes to prevent the

²⁰In *re Brown's Will* (1930) 252 N. Y. 366, 169 N. E. 612, 614; *Morsman v. Commissioner of Internal Revenue* (C. C. A. 8th, 1937) 90 F. (2d) 18.

²¹*Niccolls v. Niccolls* (1914) 168 Cal. 444, 143 P. 712.

²²*Johnson v. Becker* (1930) 251 Mich. 132, 231 N. W. 96.

²³*Plymale v. Keene* (1926) 76 Mont. 403, 247 P. 554.

²⁴*Roberts v. Taylor* (C. C. A. 9th, 1924) 300 F. 257, *cert. denied* 266 U. S. 629, 45 S. Ct. 195, 69 L. Ed. 477; *Harrod v. McComas* (1908) 78 Kans. 407, 96 P. 484.

²⁵For a collection of cases see 1 *SCOTT ON TRUSTS* (1939) §56.5, note 1.

²⁶*Bery v. Shelden* (1935) 99 Mont. 321, 43 P. (2d) 239.

²⁷*Schenck v. Barnes* (1898) 156 N. Y. 316, 50 N. E. 967.

same trusts in personal property that are possible elsewhere. In New York the courts have held that statutory provisions, fore-runners of the Field Code section from which Section 6787 was taken, do not limit the purposes for which trusts in personal property may be created.²⁴ California also held that statutory provision²⁵ similar to Section 6787, did not apply to personal property.²⁶

There would also seem to be no difficulty in following the provision for payment of the rents and profits to the settlor for the life with a provision for the sale and disposal of the proceeds after the settlor's death. In California under that section the Court upheld a deed of real estate to a trustee upon trust to sell the property ten months after the testator's death and divide the proceeds among certain beneficiaries.²⁷ The effect of this was to leave a legal life estate in the trustor and to create a future estate in fee in the trustee on trust to sell as is specifically provided for under Section 6787 (1), R. C. M. 1935.

The trustor should be careful not to follow the provision for the life interest with a provision imposing upon the trustees the duty to convey to the person or persons whom he desires to enjoy the property upon his death. The Supreme Court of California applying California Civil Code Sections 857 and 864, identical with Sections 6787 and 6791, R.C.M.1935, held in *In re Fair's Estate*²⁸ that such a provision was void as an attempt to create an active trust in land not permitted by Section 857 and that the property would not go to the person to whom the trustee was directed to convey, although under Section 864 of its code as under Section 6791, R. C. M. 1935, "The author of the trust may in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust."

If in the instrument creating a trust of real property the settlor provides that rents and profits be paid to him for life and upon termination of this trust the property should go to his chosen beneficiary, the trust would clearly be within the provisions of Sections 6787 and 6791 and the trust and the legal remainder should be held valid.

²⁴ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS (1936) §67 citing: *Everitt v. Everitt* (1864) 29 N. Y. 39, 71; *Gilman v. McArdle* (1885) 99 N. Y. 451, 2 N. E. 464; *Cochrane v. Schell* (1894) 140 N. Y. 516, 534, 35 N. E. 971, 976.

²⁵CAL. CIV. CODE §857 (Repealed by STATS. 1929, p. 282).

²⁶*Toland v. Toland* (1898) 123 Cal. 140, 55 P. 681.

²⁷*Nichols v. Emery* (1895) 109 Cal. 323, 41 P. 1089.

²⁸(1901) 132 Cal. 523, 64 P. 1000 (reversing opinion in department, (1900) 132 Cal. 523, 60 P. 442.)

However, unless the settlor should desire to have some one manage the property for him there would seem to be no particular reason in establishing a trust. As in *Berry v. Sheldon*²² he can accomplish the same purposes by conveying a legal remainder in fee reserving a legal life estate for himself.

The trustor may want to go further and be able to enjoy not only the life income but also reserve the right to cut into or take all the principal for his own use and to change his mind at any time during his life as to who will enjoy what is left of the property on his death.

In the absence of statutory provisions to the contrary, the cases elsewhere are in substantial agreement, both with regard to real and personal property, that a trust in which the trustor reserves a life interest and power to revoke the trust at any time during his life is not testamentary.²³ The trustor may also reserve the power to alter or amend the trust,²⁴ or the power to recall a part of the trust at any time,²⁵ or to change the beneficiaries.²⁶ The power to revoke "as an entirety this deed of trust" has been held not to carry with it the power to revoke in part.²⁷ Although the power to revoke the whole would generally carry with it the power to revoke a portion, it is perhaps wise to reserve a power to revoke in part.

The Court in *Warsco v. Oshkosh Savings and Trust Co.*²⁸ distinguished between a reservation of a power to revoke in whole or in part and a provision that the trustee shall on demand "pay any . . . of the moneys . . . derived from the said certificate of deposit" to the creator of the trust and held a trust containing the latter provision testamentary. Although it seems to be a case of a distinction without a difference and the case was repudiated by the legislature of Wisconsin²⁹ and has apparently not been followed elsewhere, nevertheless the trustor will be wise to use the language of revocation.

There is one other warning. Although the language of

²²See note 22 *supra*.

²³The cases are collected in 1 SCOTT ON TRUSTS (1939) § 57.1, note 1; *Nichols v. Emery* (1895) 109 Cal. 323, 41 P. 1089; *Allen v. Hendrick* (1922) 104 Ore. 202, 206 P. 733.

²⁴*Jones v. Old Colony Trust Co.* (1924) 251 Mass. 309, 146 N. E. 716; *Roche v. Brickley* (1926) 254 Mass. 584, 150 N. E. 866; *Allen v. Hendrick* (1922) 104 Ore. 202, 206 P. 733.

²⁵In *Keck v. McKinstry* (1928) 206 Iowa 1121, 221 N. W. 851 the creator also reserved the right to appoint new trustees.

²⁶*Siter v. Hall* (1927) 220 Ky. 43, 294 S. W. 767; *Wilcox v. Hubbell* (1917) 197 Mich. 21, 163 N. W. 497.

²⁷*National Newark and Essex Banking Co. v. Rosahl* (1925) 97 N. J. Eq. 74, 128 A. 586.

²⁸(1924) 183 Wis. 156, 196 N. W. 829.

²⁹WISC. STATUTES 1935, §231.205 (LAWS OF WIS. 1931, c. 216).

trust is used and the legal title is vested in purported trustees if too much control over their actions has been reserved, the Court may decide that they are simply agents to whom legal title has been given and the disposition will fail as testamentary. There are several cases so holding." One of these, *McEvoy v. Boston Five Cent Savings Bank*,³⁸ is much relied on by the others. In the case the trustor reserving a power of revocation transferred her savings bank deposits to trustees who were to pay her as much of the money on deposit as she might demand during her life, pay her funeral expenses and the balance to designated beneficiaries. The case has caused and is likely to cause further confusion. *McGillivray v. First National Bank of Dickinson*,³⁹ understood the case as putting limitations upon the power of revocation. In Montana counsel for appellant in *Roecher v. Commercial National Bank*,⁴⁰ apparently relied on the *McEvoy* case as so holding in his argument that reservations in a trust which permitted the settlor to take from the principal fund or securities enough to maintain him and his wife in their stations in life made the trust testamentary and invalid. The Montana Court decided that counsel's contention was invalid, but did so on a ground which does not decide the question in Montana.

In Massachusetts where the *McEvoy* case was decided, the Supreme Court subsequently made it clear in *Jones v. Old Colony Trust Co.*⁴¹ that unlimited powers of revocation do not make the trust testamentary. The *Jones* case also left the matter in doubt in Massachusetts as to what control could be reserved over the trustees in their management of the trust property and yet not make them simply agents and the trust testamentary. According to this case, the test is not the same as that used in determining whether a business organization is a business trust or a joint stock company.⁴² Differing views prevail in different jurisdictions. In *Union Trust Co. v. Hawkins*⁴³ in which the court held the trust testamentary and that the control reserved by the trustor made the trustee an agent, the

³⁸*McEvoy v. Boston Five Cents Savings Bank* (1909) 201 Mass. 50, 87 N. E. 465; *McGillivray v. First National Bank of Dickinson* (1928) 56 N. D. 152, 217 N. W. 150; *Union Trust Co. v. Hawkins* (Ohio App. 1927) 161 N. E. 548; *Warsco v. Oshkosh Savings and Trust Co.* (1924) 183 Wis. 156, 196 N. W. 829. See also *Darling v. Mattoon State Bank* (1926) 189 Wis. 117, 207 N. W. 254.

³⁹(1909) 201 Mass. 50, 87 N. E. 465.

⁴⁰(1928) 56 N. D. 152, 217 N. W. 150.

⁴¹(1930) 87 Mont. 570, 581, 289 P. 388, 391.

⁴²(1924) 251 Mass. 309, 146 N. E. 716.

⁴³At p. 309 of 251 Mass., p. 717 of 146 N. E.

⁴⁴(Ohio App. 1927) 161 N. E. 548.

trust instrument required that all investments be submitted to and approved by the settlor whose decision was to be final. See comment on this case in a later Ohio case, *Cleveland Trust Co. v. White*.⁴⁴ In *Keck v. McKinstry*⁴⁵ in which the trustor reserved the actual management of the property during his life and the right to change trustees, the trustee's active duties beginning on his death, the trust was held not to be testamentary. In *Kelly v. Parker*⁴⁶ a trust was held not testamentary and void in which the settlor deeded land to trustees with a provision that the trustee permit the settlor to use, occupy, manage, control, improve, lease in any manner, and enjoy all the rents and profits in the same manner as if he were the owner in fee. In a number of other cases the retention by the settlor of considerable control over the trustee or almost unlimited control over the trust property, has been held not to make the trust testamentary.⁴⁷ The Restatement of the Law of Trusts in Section 57 (2) and comment thereon reflects the difficulty in drawing the line. In view of the different results reached in the decisions, it would appear unwise to attempt to reserve too much control over the trustee or the trust property. However, a large measure of control may be exercised by reason of the power of revocation. If the trustee is not amenable to the trustor's suggestion the latter may revoke and set up a new trust.

If the settlor chooses to make himself the trustee he may perhaps retain more control over the investments. This is true in Massachusetts where *McEvoy v. Five Cent Savings Bank* was decided.⁴⁸ Such a trust was held not testamentary in *Murray v. O'Hara*⁴⁹ though there is a caution in the case that the real intent of the settlor must not be testamentary. In *Irving Bank Columbia Trust Co. v. Rowe*⁵⁰ a trust was held not testamentary in which the settlor declared himself trustee of securities for his son, reserved the power to revoke and kept the income for himself. The son never learned of the trust until after the death of the settlor who had apparently made, at will, substitutions of securities, though keeping the principal

⁴⁴(1938) 134 Ohio St. 1, 15 N. E. (2d) 627. Right to revoke was reserved on consent of trustees.

⁴⁵(1926) 206 Iowa 1121, 221 N. W. 851.

⁴⁶(1899) 181 Ill. 49, 54 N. E. 615.

⁴⁷*Bear v. Millikin Trust Co.* (1929) 336 Ill. 366, 168 N. E. 349, 73 A. L. R. 173; *Goodrich v. City National Bank and Trust Co.* (1935) 270 Mich. 222, 258 N. W. 253; *Davis v. Rossi* (1930) 326 Mo. 911, 34 S. W. (2d) 8; *Cleveland Trust Co. v. White* (1938) 134 Ohio St. 1, 15 N. E. (2d) 627.

⁴⁸(1909) 201 Mass. 50, 87 N. E. 465.

⁴⁹(1935) 291 Mass. 75, 195 N. E. 909.

⁵⁰(1925) 213 App. Div. 281, 210 N. Y. S. 497.

amount at the same value. In *Sturgis v. Citizens' National Bank of Pocomoke City et al.*²¹ the settlor made a deposit in the name of himself and another as trustees for the two subject to check by either, the balance to go to the survivor. No signature card was ever procured from the beneficiary. The trust was held nontestamentary and valid. In *DeLeuil's Ex'rs et al. v. DeLeuil*²² the trustor put securities in a box, informed the bank he intended them to be in trust for his daughter, used the income, and changed the securities from time to time. The Court held that a valid inter vivos trust had been created. In *McGillivray v. First National Bank*,²³ however, in which there was slim evidence of an attempt to create a trust, the Court relied on the fact that the trustor retained unqualified control over the property in reaching its conclusion that no trust was created. The Restatement of Trusts, Section 57(3), lays down the following rule:

"Except as stated in §58, where the settlor declares himself trustee and reserves not only a beneficial life estate and a power to revoke and modify the trust but also power to deal with the property as he likes as long as he lives, the intended trust is testamentary."

See also the Comment to Subdivision 3.

The trustor must then proceed with caution for the Montana Court may find that he has stepped over the ill defined lines suggested in this subdivision and some of the cases.

McEvoy v. Boston Five Cent Savings Bank is a potential source for further confusion. The Court in bolstering its opinion said:

"But if it be thought that this view of the construction and necessary legal effect of the instrument is too favorable to the claimant, the exceptions must be overruled on the ground that the evidence justified a finding by the trial judge that the paper was intended as a mere testamentary disposition of property, and not as a creation of a trust for any other purpose, and that therefore there was no error of law in the finding."²⁴

The Massachusetts court again in *Roeche v. Brickley* said:

"The judge has found that there was no violation of the statute of wills. The fact that the plaintiff conveyed only a small portion of her property by the trust agreement

²¹(1927) 152 Md. 654, 137 A. 378.

²²(1934) 255 Ky. 406, 74 S. W. (2d) 474.

²³(1927) 56 N. D. 152, 163, 164, 217 N. W. 150, 153, 154.

²⁴(1909) 201 Mass. 50,55, 87 N. E. 465, 466.

does not of itself establish that the conveyance was not testamentary and so not in violation of the statute of wills. A conveyance may be bad because of such violation, although it does not dispose of all one's property. But taken in connection with other facts, especially that the gift takes effect on the execution of the trust instrument, the fact that a small part only of the donor's property is affected is persuasive that the instrument is not testamentary. The first contention fails.'⁵⁵

The policy of the Statute of Wills does not prevent a person from deeding his property away at any time before his death and so avoid the necessity of making a will. And it does not seem at all likely that the Court which decided these cases will hold testamentary a trust in which the avowed purpose of the settlor is to avoid the expenses and delay incident to probate or administration proceedings. There can hardly be any policy of the law requiring an owner of property to submit to these inconveniences. It is not clear what the Court means by violating the Statute of Wills. In the very case of *Roeche v. Brickley*⁵⁶ it was evident to the Court that the settlor was making a trust as a substitute for a will and also that she was doing it in order to accomplish a purpose which she couldn't accomplish if she were to leave property by will—namely, place "her property in such a way that her husband would not share in its distribution on her death". Incidentally such a use of the trust in contrast with its use simply to avoid the expense and delay of administration, might well be condemned as an evasion,⁵⁷ as being "on the wrong side of the line indicated by the policy if not by the mere letter of the law" to use the language of Mr. Justice Holmes.⁵⁸ Additional cases⁵⁹ have upheld revocable trusts in which the obvious purpose of the trustors was to have the use of the property during their lives and to deprive their spouses at the trustor's death of property of which they could not be deprived by will. Although in at least one other case⁶⁰ in which the trust was upheld there is the suggestion that the trust might be bad if the settlor's intention was

⁵⁵At. p. 588 of 254 Mass., p. 868 of 150 N. E.

⁵⁶At p. 586 of 254 Mass., p. 868 of 150 N. E.

⁵⁷1 SCOTT ON TRUSTS (1939) §57.5. And see *Newman v. Dore* (1937) 275 N. Y. 371, 9 N. E. (2d) 966, 112 A. L. R. 643.

⁵⁸*Bullen v. Wisconsin* (1916) 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830.

⁵⁹*Sturgis v. Citizens' National Bank of Pocomoke City* (1927) 152 Md. 654, 137 A. 378; *Windolph v. Girard Trust Co.* (1914) 245 Pa. 349, 91 A. 634; *Belrne v. Continental-Equitable Trust Co.* (1932) 307 Pa. 570, 161 A. 721.

⁶⁰*Stone v. Hackett* (1858) 12 Gray (Mass.) 227.

to evade the Statute of Wills, no case has been found holding a trust bad on those grounds despite the fact that to use the words of the Illinois Court in *Patterson v. McClenathan*^a "most deeds of trust by which a trust is created to continue after the death of the grantor are made to avoid the making of a further disposition of the property." And there is additional authority that a trust is not invalid because made in lieu of a will^b and to avoid administration after the settlor's death.^c

There is no direct Montana authority covering to any extent the problems that have just been discussed. There is no reason to doubt that Montana will follow the general current of authority representing as it does the current views of those decisions as to what is the common law, which is the rule of decision in Montana in the absence of constitutional or statutory provisions to the contrary,^d or, unless out of harmony with our democratic institutions, or inapplicable to our present day conditions.^e There is nothing in the law so laid down which could be said to be inapplicable to present day conditions. There are however some statutes to be considered.

At the outset two Montana statutes may be briefly noted. Section 6790, R. C. M. 1935, provides:

"Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

There is no indication in Montana that such a statute will affect our problem. The cestui is recognized as having the same equitable estate or interest which he would have in states having no such statute^f although the Court may in the decision reiterate the language of the code.^g

Section 7921, R. C. M. 1935, provides that the trustor may reserve the power to revoke which power he must strictly pursue. There is no reason to believe that this power is limited to re-

^a(1921) 296 Ill. 475, 482, 129 N. E. 767, 770.

^b*Bear v. Milliken Trust Co.* (1929) 336 Ill. 366, 168 N. E. 349.

^c*Nichols v. Emery* (1895) 109 Cal. 323, 41 P. 1089. This is the view taken in the RESTATEMENT OF TRUSTS §57 (1) comment d.

^dR. C. M. 1935, §§5672, 10703.

^e*State ex rel. Metcalf v. District Court* (1916) 52 Mont. 46, 49, 155 P. 278.

^f*Town of Cascade* (1926) 75 Mont. 304, 243 P. 806; 90 Mont. 180, 300 P. 539.

^g*In re Murphy's Estate* (1935) 99 Mont. 114, 43 P. (2d) 233.

voking the whole of the trust. California under the same section⁶⁶ has frequently assumed the power to revoke in part."

The statutory provisions in regard to trusts of land require closer study. Section 6787, R. C. M. 1935, sets forth the purposes for which an express trust in real property may be created and Section 6783 provides that these are the only trusts which can be created in Montana real property.

Under Subdivision 1 of Section 6787 the trustor may create a trust "to sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust." It should under this section be possible to devote the proceeds to any purpose for which a trust in personal property could be created⁶⁷ and the discussion concerning trust of personal property would then apply. Subdivision 3, the other subdivision pertinent for our purposes, permits a trust in which the trustee is to receive the rents and profits of real property, and "to pay or apply them to the use of any person . . . during the life of such person . . . or for any shorter term."

While the trustor under this section could provide that the rents and profits following the trustor's death should go to other persons for life subject to the rules of Sections 6733 to 6759, R. C. M. 1935, at the end of such periods the trust must terminate unless he directs the trustee to sell and dispose of those proceeds in accord with subdivision 1, or makes provision under 2 and 4, which are perhaps unimportant for our purposes. The trustor will under Section 6791 be able in the instrument creating the trust to designate the persons to whom the property shall go on the termination of the trust."

As to the trusts, Section 7921, R. C. M. 1935, permits the power of revocation. May the trustor reserve the power to revoke during his life the legal remainder in fee and to transfer it to some one else? Section 6717⁶⁸ apparently renders this

⁶⁶CAL. CIV. CODE 1937, §2280. The California section was amended in 1931 (STATS. 1931, p. 1955).

⁶⁷Hellman v. McWilliams (1886) 70 Cal. 449, 11 P. 659; Booth v. Oakland Bank of Savings (1898) 122 Cal. 19, 54 P. 370; In re Willey's Estate (1900) 128 Cal. 1, 60 P. 471; Noble v. Learned (1908) 153 Cal. 245, 94 P. 1047.

⁶⁸See Nichols v. Emery (1895) 109 Cal. 323, 41 P. 1089. Deed of real estate in trust to sell within ten months after trustor's death and hold the proceeds on trust.

⁶⁹See *supra*, p. 22.

⁷⁰R. C. M. 1935, §6717. "A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is the future interest, thus liable to be defeated, to be on that ground adjudged void in its creation."

possible. California has the same provision." In *Tennant v. John Tennant Memorial Home*,¹⁶ the court relying on the provision held that a deed of real estate to the Home "excepting, however, and reserving to said grantor the exclusive possession, and the use and enjoyment in her own right, of the rents, issues and profits of said lots . . . during the term of her natural life" and reserving the power to revoke the deed as to the property, or any portion of it, and further right to sell it, or any portion of it, to another and keep the proceeds, was valid; that the effect of the deed was to give the Memorial Home a future interest; and that under the code section the power to revoke or to sell was validly reserved and the original conveyances were not invalid as testamentary. The same results are reached in other jurisdictions not having statutory provisions, the courts holding that the testator may deed a legal fee to others reserving a life interest in himself, and power to revoke¹⁷ or to transfer to others during his lifetime.¹⁸ Thus in *Kokomo Trust Co. v. Hiller*¹⁹ the testator had during his lifetime executed deeds and delivered them to his lawyer with directions to record them on his death. In the deeds it was recited "the grantor reserves full possession and control of the property and the right to sell and convey said real estate during his lifetime, but if at his death he die seised . . . then the conveyance shall be in full force and effect." The court held that the deeds reserved life estates in the grantor; vested fees in the grantees which were defeasible on the exercise by the grantor of his reserved power to sell or convey; and that the conveyances were not testamentary.

Where the owner's desire is to reserve the utmost possible control over his real property during his life as well as retain the power during his life time to determine who shall enjoy it after his death it apparently would be wise to follow the method employed in the *Tennant*²⁰ case rather than risk the possibilities of having the trust declared testamentary as in *McEvoy v. Boston Five Cent Savings Bank*²¹ on the grounds that the trustee was only an agent. Section 6717, R. C. M. 1935, seems to demand the result reached by the California Court and in view

¹⁶CAL. CIV. CODE 1937, §740.

¹⁷(1914) 167 Cal. 570, 140 P. 242.

¹⁸*Jones v. Clifton* (1879) 101 U. S. 225; *Ricketts v. Louisville, St. Louis & Texas P. Co.* (1891) 91 Ky. 221, 15 S. W. 182, 11 L. R. A. 422, 34 Am. St. Rep. 176; *Stamper v. Venable* (1906) 117 Tenn. 557, 97 S. W. 812; 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) §681.

¹⁹TIFFANY, *op. cit. supra*, note 75, §681 and notes 53 and 54 citing cases.

²⁰(1917) 67 Ind. App. 611, 116 N. E. 332.

²¹(1914) 167 Cal. 570, 140 P. 242.

²²(1909) 201 Mass. 50, 87 N. E. 465.

of the fact that it accords with the prevailing law on the subject, there is no reason to suppose that our Court will reach a result contrary to that of the *Tennant* case.⁸⁰ Unless, therefore, the owner of land desires that another have the responsibility of it as trustee during his life, there would seem to be no particular advantage in the trust device over deeding a legal fee, reserving a legal life estate and the power to revoke the fee or any part thereof or convey to others. Either device, however, should be held to be valid.

Suppose, however, the owner of real property in Montana declares himself a trustee to pay the rents and profits to himself for life, and, carefully avoiding putting upon himself the duty to convey the fee, in the same instrument provides that the legal remainder in fee should go to others reserving however the power to revoke in whole or in part or to convey to others. Where the same individual has the entire legal, as well as the entire beneficial interest, there is no trust.⁸¹ Since the same person has all the legal and equitable interest that was attempted to be put in trust, the Court would in all probability take the view that the owner had simply a legal life estate with legal remainder over. The result would then not be different from that reached in the *Tennant* case. When it comes to personal property, however, the trust device may be more important. In the first place, as has been previously stated,⁸² the limitations put by Section 6787 upon trusts do not apply to personal property. In the second place, there may perhaps be more need for the trust since the law is unsettled as to future legal interests in personal property. In the majority jurisdictions it is clear that an interest analogous to a remainder after a life estate may be created⁸³ but whether when the attempt is to give A a life interest, remainder to B, A has a right only to possession, the immediate vested right of property being in B, or A has the legal right of property which on his death shifts to B, or A holds the whole interest in the chattel in trust is not clear.⁸⁴ Our statutes do not clarify the situation. Section 6698, R. C. M. 1935, provides:

⁸⁰R. C. M. 1935, §6845 providing that a grant can't be delivered to a grantee conditionally should have no more effect than the same provisions in §1056 CAL. CIV. CODE had in the *Tennant* case. That statute simply embodies the common law rule in regard to delivery of deeds. See 1 WILLISTON ON CONTRACTS (Rev. ed. 1936) §212.

⁸¹1 SCOTT ON TRUSTS (1939) §99, and cases cited in note 1 thereto.

⁸²See *supra*, pp. 21, 22.

⁸³Simes, *Future Interests In Chattels Personal*, 39 YALE L. J. 771, 784, note 36 (1930) citing cases.

⁸⁴GRAY, *RULE AGAINST PERPETUITIES* (3rd ed. 1915) §69.

"The names and classification of interests in real property have only such application to interests in personal property as is in this division of the code expressly provided."

There appears to be no such specific provisions in the division of the Code.

There is the further question whether a revocable future legal interest of personal property could be given.¹ In view of the very great uncertainty as to the subject of future interests in personal property "it may almost be said to be a slip in draftsmanship to create future interests in chattels personal without the intervention of the trust" as one writer puts it.² Although there is no direct Montana authority in point there is no reason to suppose that the court would refuse to follow current authority³ which upholds as nontestamentary a conveyance to trustees upon trust for the trustor for life, remainder to others with power of revocation reserved. As in the case of realty the trustor should be careful not to reserve too great a control over the trustee or the trust property for fear that the court may as in the *McEvoy* case treat the trustee as an agent and the conveyance as testamentary.⁴

If the trustor makes himself sole trustee upon trust to pay the income to himself for life and subject there-to in trust for others on his death, he may have more control over the investments. Our Court might possibly take the view, criticized by Professor Scott,⁵ of the New York Court based, however, on a statute not found in Montana, and treat the legal and equitable estate as merging in a legal life estate in the trustor with the remainder in fee in others. As pointed out by Professor Scott in most of the cases the rights which the parties would have had in the trust as cestuis had the conveyance been treated as making a trust, including the power to cut in or take the whole of the principal, were fully protected. How-

¹§6884 in the chapter on transfer of personal property provides that "A gift, other than a gift in view of death, cannot be revoked by the giver."

²Simes, *op. cit. supra*, note 83, p. 779.

³In addition to authorities previously cited see particularly the California cases, where code provisions are similar to ours, cited in note 69, *supra*.

⁴*Supra*, pp. 23, 24.

⁵1 SCOTT ON TRUSTS (1939) §99.3. See particularly *Woodward v. James* (1889) 115 N. Y. 346, 22 N. E. 150; *Rose v. Hatch* (1891) 125 N. Y. 427, 26 N. E. 467 (right to use so much of the corpus as was necessary for the support and maintenance of the life tenant); *Weeks v. Frankel* (1910) 197 N. Y. 304, 90 N. E. 969 (power of sale); *Major v. Major* (1917) 177 App. Div. 102, 163 N. Y. S. 925.

ever, in *Matter of Richardson*,¹⁰ discussed by Mr. Scott, the life tenant was required to give bond. In the situation we are considering the Court would have no reason for requiring bond even if it treated the transaction as giving the creator a legal life interest with remainder over since he has full power to revoke. If the New York view were taken, the result as to personalty would be about the same as that reached in regard to realty in the *Tennant* case.¹¹

One particular class of case deserves especial notice. In *Matter of Totten*¹² the Court, in a case involving a deposit in a savings account, laid down what is known as the "tentative trust" doctrine in the following language:

"A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

It was regarded at the time as a radical innovation and judicial legislation by at least one writer¹³ who thought it, however, constructive legislation though difficult to justify as an exercise of judicial power.

It will be noted that the deposit is treated as creating a revocable trust though the depositor has not expressly reserved the power of revocation and the beneficiary receives the balance on the depositor's death although the latter has reserved absolute control of the property during his lifetime. Evidence is of course admissible to show that he intended to create an irrevocable trust or that he intended no trust at all. The American Law Institute has accepted the doctrine.¹⁴ Under its Restatement of the Law of Trusts death of the beneficiary prior to the trustor will revoke the trust and the trustor may revoke it in his will. The convenience of the device is obvious which

¹⁰(1929) 135 Misc. 726, 238 N. Y. S. 271; aff'd. mem. (1930) 229 App. Div. 765, 243 N. Y. S. 845.

¹¹(1914) 167 Cal 570, 140 P. 242.

¹²(1904) 179 N. Y. 112, 125, 71 N. E. 748, 752.

¹³Larremore, *Judicial Legislation*, 14 YALE L. J. 312, 315 (1905).

¹⁴RESTATEMENT OF THE LAW OF TRUSTS, §58.

probably accounts for its adoption in some other states.⁹⁵ There have been no Montana decisions on the question. Section 6014.54, R. C. M. 1935, reads:

"Whenever any deposit shall be made in any bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the interest or dividends thereon, may be paid to the person for whom said deposit was made."

An almost identical statutory provision in *Jefferson Trust Co. v. Hoboken Trust Co.*,⁹⁶ and similar provisions in *Alger v. North End Savings Bank*⁹⁷ and *Thatcher v. Trenton Trust Co.*⁹⁸ were said by the courts to be designed simply to protect the banks in case of payment to the beneficiary. The courts in these two states take a view contrary to *Matter of Totten* and permit the personal representative of the depositor to prevail over the beneficiary.

In view of the present state of authority the depositor in Montana by making a deposit such as that made in *Matter of Totten* could not with certainty count on having the named beneficiary receive what was left in a savings account. Undoubtedly the position taken by the Restatement will help to establish the doctrine in states which have not already taken a contrary view. At least two cases⁹⁹ which followed *Matter of Totten* have cited Section 58.

There is a closely related method of using the trust which should succeed in jurisdictions following *Matter of Totten* and has succeeded in others prior to the decision in the Totten case. In *Milholland v. Whalen*¹⁰⁰ the settlor deposited money in her own name "in trust for herself and Mary Whalen, widow, joint owners subject to the order of either; the balance at the death of either to belong to the survivor." The depositor retained the bank book and never notified Mary Whalen of the deposit.

⁹⁵The New York cases following in *Matter of Totten* are collected in 1 SCOTT ON TRUSTS (1939) §58.3, note 4, those from other jurisdictions in note 5, and in note 6 those that hold that the beneficiary is not entitled on the death of the depositor. The "tentative trust" is exhaustively treated 1 SCOTT ON TRUSTS (1939) §§58 to 58.6.

⁹⁶(1930) 107 N. J. Eq. 310, 152 A. 374.

⁹⁷(1888) 146 Mass. 418, 15 N. E. 916.

⁹⁸(1936) 119 N. J. Eq. 408, 182 A. 912.

⁹⁹*Bollack v. Bollack* (Md. 1936) 182 A. 317 (in which it was clear from the form of deposits that the beneficiary was to have what was left on depositor's death); *In re Pozzuto's Estate* (1936) 124 Pa. Super. 93, 188 A. 309.

¹⁰⁰(1899) 89 Md. 212, 43 A. 43.

Mary Whalen was held entitled on the death of the depositor to what remained of the deposit. The importance of depositing upon trust is shown by a companion case, *Whalen v. Milholland*.¹⁰¹ The deposit being made: "Elizabeth O'Niel and Mary Whalen. Payable to the order of either or to the survivor." The Court held that a delivery of the savings bank book was necessary to complete the gift and therefore Mary failed in the action.

However, in *Booth v. Oakland Bank*¹⁰² the depositor expressed a desire to the teller to add the names of two sisters to her savings account so that in the event of her death they could draw out the money without probate proceedings. She then furnished the signatures of her sisters and the bank added their names to the pass book. She then notified the sisters that on her death they could collect what was left on deposit and divide equally between them. She retained the passbook. The California Supreme Court held that there was an incomplete gift but that there was enough evidence to justify the court below in finding a trust in favor of the sisters; that the fact that she reserved power to withdraw so much as she saw proper during her lifetime did not affect the validity of the trust and therefore the court erred in nonsuiting the sisters.

In *Noble v. Learned*¹⁰³ the California Supreme Court in refusing, in line with current authority,¹⁰⁴ to turn an imperfect gift in to a trust, on having the *Booth* case pressed upon it, called attention to the fact that that case involved a non-suit and that therefore if there was any evidence of a trust the nonsuit would be improperly granted. In a subsequent California case, however, an imperfect gift was sustained as a trust.¹⁰⁵

The trust is frequently used in place of a will and with success in order to avoid some statutory provisions which inhibit the will making power. As has been noted it has been successfully used to deprive a spouse of property which he or she could not be deprived by will even in those jurisdictions which suggest the possibility that the trust would be bad if used to violate the Statute of Wills.¹⁰⁶ Many other cases are to be found including both those where the trust is irrevocable¹⁰⁷ and revocable.¹⁰⁸

¹⁰¹ (1899) 89 Md. 199, 43 A. 45.

¹⁰² (1898) 122 Cal. 19, 54 P. 370.

¹⁰³ (1908) 153 Cal. 245, 94 P. 1047.

¹⁰⁴ 1 SCOTT ON TRUSTS (1939) §31, note 1.

¹⁰⁵ *American Bible Soc. v. Mortgage Guarantee Co.* (1932) 217 Cal. 95, 17 P. (2d) 105.

¹⁰⁶ *Supra*, pp. 26-28.

¹⁰⁷ 1 SCOTT ON TRUSTS (1939) §57.5, note 1.

¹⁰⁸ Cases Collected in 1 SCOTT ON TRUSTS (1939) §57.5, note 2.

Judging from the weight of authority the chances are very good that a married woman may in Montana by the revocable trust device secure to herself the enjoyment of her property during her life and to others than her husband the enjoyment of all of it upon her death despite the fact that Section 6975, R. C. M. 1935, prevents her from depriving him of more than two-thirds of it by will. But this is not entirely free from doubt. In the recent case of *Newman v. Dore*¹²⁰ the Court of Appeals in New York in a case in which the settlor reserved the power to control the trustees as well as the enjoyment of the property during his life and the power of revocation, and gave all the beneficial interest in fee to others than his wife, the Court assuming, without deciding, that for other purposes the trust would not be testamentary and invalid, held that with reference to the New York statutory provisions limiting the rights to deprive the spouse of property by will the trust was illusory and not effective to deprive the settlor's widow of her rights.

The trust would seem to be an equally good device for evading Section 7015, R. C. M. 1935, making invalid devises or bequests of more than one-third the testator's property by a will executed within thirty days of his death. A device frequently used is to leave the property to a person or persons absolutely and then take steps to see that some one shall notify the legatees or devisees after the testator's death of his desires. The scheme is dangerous because the devisee or legatee may if he desires keep the property for himself.¹²¹ On the other hand a trust *inter vivos* carefully framed for the purpose would not entail the risk and would stand a very good chance of evading Section 7015.

In summary, the owner of property in Montana should be able to count with reasonable certainty on the fact that by a trust carefully created during his lifetime, he may have the beneficial use of his property as long as he lives and retain till death the power to determine who shall succeed him in the enjoyment of it. He may thus avoid the expense and delay of administration of an estate.

If he desires, however, to control the management of his

¹²⁰(1937) 275 N. Y. 271, 9 N. E. (2d) 966. See notes on the case in 37 COLUM. L. REV. 1219 (1937); 23 CORNELL L. Q. 457 (1938); and discussion in 1 SCOTT ON TRUSTS (1939) §57.5.

¹²¹Schultz Appeal (1876) 80 Pa. 396; Flood v. Ryan (1908) 220 Pa. 450, 69 A. 908; In re Bickley's Estate (1921) 270 Pa. 101, 113 A. 68; See also O'Donnell v. Murphy (1912) 17 Cal. App. 625, 120 P. 1076. For a general discussion see Leaphart, *The Use, As Distinct From The Trust, A Factor in the Law Today*, 79 U. OF PA. L. REV. 253 (1931).

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real property during his life, it would seem safer to deed the property to his intended beneficiaries reserving a legal life estate for himself with power to revoke and to convey the fee to others. If he desires to vest the management of his real property in others he may convey to trustees upon trust to pay the rents and profits to himself for life and provide that upon his death the legal remainder shall go over to others reserving during his life the power of revocation and of transfer to others.

As to personal property, the trust seems the wiser device, and whether an owner makes himself or another the trustee, he should not retain the power to deal with the property as though the conveyance had never been made for fear that the transactions will be held to be testamentary. Just where the line will be drawn is not clear. If, however, an owner of money makes a deposit of it in a savings bank in his own name in trust for another the chances are that he may deal with the deposit as he pleases during his life, and on his death the balance left in the account will go to the intended beneficiary. It is also probable that Sections 6975 and 7015, R. C. M. 1935 may be evaded by use of the trust device.